Editor's note: 91 I.D. 159; Reconsideration denied by Order dated July 16, 1984

S & M COAL CO.
AND
JEWELL SMOKELESS COAL CO.
v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 83-620 Decided March 22, 1984
IBSMA 82-20

Appeal from the decision of Administrative Law Judge Tom M. Allen affirming the issuance of Notice of Violation No. 81-I-73-15. CH 2-31-R.

Reversed.

1. Evidence: Prima Facie Case -- Hearings -- Rules of Practice: Evidence -- Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

   A prima facie case is made where sufficient evidence is presented to establish the essential facts. Prima facie evidence is that evidence that will justify a finding in favor of the one presenting the evidence. It is not necessary to present evidence that is compelling, and the determination must be made on a case-by-case basis. An important factor in making a determination regarding the amount of evidence required for a prima facie case is the availability of the evidence and the difficulty which may reasonably be encountered in obtaining the evidence.

2. Surface Mining Control and Reclamation Act of 1977: Applicability: Generally -- Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: 2-Acre

   One claiming an exemption from regulation under the Surface Mining Control and Reclamation Act of 1977

bears the burden of affirmatively demonstrating entitlement to the exemption.

3. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Permittees

Under the initial regulatory program one who conducts a surface coal mining operation regulated by a state under state law is a permittee whether or not required to hold a permit under state law. The permittee is responsible for compliance with the performance standards applicable to the operation. If there is question as to who is responsible for compliance with those standards, it is proper for the inspector issuing the notice of violation to cite all of the parties who may be responsible. If a cited party can submit sufficient proof that it is not responsible for compliance, the violation will not be considered a violation by that party.

4. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Permittees

Under the initial regulatory program, if there is no valid permit in existence with respect to a coal mining operation and the coal is being mined pursuant to an oral lease, both the party extracting the coal and the lessor can be considered to be permittees, as both have the ability to exercise control over the operations.

5. Surface Mining Control and Reclamation Act of 1977: Applicability: Generally -- Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: 2-Acre

A coal mine which disturbs less than 2 acres of surface land is exempt from the application of the Surface Mining Control and Reclamation Act of 1977. However, an operation which is less then 2 acres in size can be under the purview of the Act if it is one of a number of operations which are collectively disturbing in excess of 2 acres and which can logically be considered to be one mine. The party claiming that an operation is, in fact, one of a number of sites which make up a single mine disturbing in excess of 2 acres carries the burden of establishing that fact.

APPEARANCES: Dennis E. Jones, Esq., Lebanon, Virginia, for appellants; P. Jeffrey North, Esq., Field Attorney, Office of the Field Solicitor, U.S. Department of the Interior, Glenda R. Hudson, Esq., Branch of Litigation and

Enforcement, Division of Surface Mining, Office of the Solicitor, U.S. Department of the Interior, and Walton D. Morris, Esq., Assistant Solicitor, Branch of Litigation and Enforcement, Division of Surface Mining, Office of the Solicitor, U.S. Department of the Interior, for the respondent.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

This is an appeal from a decision of Administrative Law Judge Tom M. Allen rendered on March 25, 1982, subsequent to a hearing held on February 5, 1982, pursuant to appellants' application for review of Notice of Violation (NOV) No. 81-I-73-15. In his decision, Judge Allen determined that: (1) The NOV had been properly issued; (2) the Office of Surface Mining Reclamation and Enforcement (OSM) had presented a prima facie case that Jewell Smokeless Coal Company (Jewell) is the principal "permittee" and primarily responsible for the NOV; and (3) appellants did not overcome the case presented.

Confusion apparently caused by instructions given by Judge Allen resulted in his not timely receiving certain requested documents. These documents were to have been collected by appellants and given to OSM for delivery by OSM to Judge Allen. The record indicates that these documents were not delivered to Judge Allen until after his decision was issued. As a result, certain conclusions drawn by Judge Allen about the contents of the documents and the credibility of the testimony of appellants' witnesses concerning the documents appear to have been based upon the failure to receive the documents and may have been improperly based. Therefore, we will review the record de novo. The authority for such review is afforded by 5 U.S.C. § 557 (1976) and 43 CFR 4.1101.

On November 4, 1981, OSM conducted an inspection of Mine No. 4, Splashdam, an underground mine located in Buchanan County, Virginia. As a result of this inspection, OSM issued an NOV to S & M Coal Company (S & M) and Jewell. The NOV charged S & M and Jewell with two violations of the Surface Mining Control and Reclamation Act of 1977 (Surface Mining Act), 30 U.S.C. §§ 1201-1328 (Supp. II 1978 and Supp. IV 1980), and the corresponding provisions of 30 CFR Part 717. The first cited violation was appellants' alleged failure to pass all surface drainage from the disturbed area through a sedimentation pond prior to leaving the disturbed area, in violation of 30 CFR 717.17(a). The second violation cited was appellants' alleged failure to display identifying signs at all points of access to the mine, in violation of 30 CFR 717.12(b). The signs required must show the name, business address, and telephone number of the permittee and identification numbers of current mining and reclamation permits or other authorizations to operate.

Following the March 25, 1982, decision of Judge Allen, an appeal was taken to the Board of Surface Mining and Reclamation Appeals. Both appellants and OSM filed briefs. On April 26, 1983, the functions of the Board of Surface Mining and Reclamation Appeals were transferred to this Board. 48 FR 22370 (May 18, 1983).

On appeal, appellants present three questions:

(1) Whether OSM made a prima facie case in proving that appellants, Jewell and S & M, were subject to the Surface Mining Act.

(2) Whether the Administrative Law Judge's factual determination in holding Jewell as the recognized permittee was supported by the evidence.

(3) Whether the Administrative Law Judge's factual determination that S & M and Jewell were economically integrated to meet the definition of a person within the Surface Mining Act is supported by the evidence.

We address each issue in turn.

Prima Facie Case

[1] A prima facie case is made where sufficient evidence is presented to establish the essential facts. E.g., Rhonda Coal Co., 4 IBSMA 124, 89 I.D. 460 (1982). Prima facie evidence is that evidence that will justify a finding in favor of the one presenting the evidence. Id. It is not necessary to present evidence that is compelling, and the determination as to whether a prima facie case has been made must be made on a case-by-case basis. An important factor in making a determination regarding the amount of evidence required for a prima facie case is the availability of the evidence. Id.

[2] The inspector who issued the citation described the physical conditions he observed at the minesite that caused him to issue the NOV. On cross-examination, appellants did not take issue with the existence of these conditions or the fact that the conditions constituted violations of the cited standards. Thus, OSM clearly presented a prima facie case that there were, in fact, violations of the underground mining general performance

standards set forth in 30 CFR Part 717. An examination of appellants' statement of reasons indicates that they do not deny the existence of these conditions.

Appellants' assertion that no prima facie case was presented is based only upon appellants' brief that OSM must make an initial showing that appellants come within the purview of the Surface Mining Act. This challenge is misguided. One claiming an exemption from regulation under the Surface Mining Act bears the burden of affirmatively demonstrating entitlement to that exemption. If an appellant contests the jurisdiction of OSM, the appellant must plead and prove the basis for its claim as an affirmative defense. Harry Smith Construction Co. v. OSM, 78 IBLA 27 (1983). When, as in this case, OSM presents a prima facie case that a violation of the Surface Mining Act or the regulations promulgated pursuant thereto has occurred, OSM has established the requisite prima facie case.

Is there Sufficient Evidence to Support the Conclusion

that Jewell is a Permittee Under the Act?

[3] Under the initial regulatory program one who conducts a surface coal mining operation regulated by a state under state law is a "permittee" whether or not required to hold a permit under state law. Jewell Smokeless Coal Corp., 4 IBSMA 211, 217, 89 I.D. 624, 627 (1982). The "permittee" is responsible for compliance with the performance standards applicable to the operation. If there is a question as to who is responsible for compliance with the standards, it is proper for the inspector issuing the NOV to cite all of the parties who may be responsible. If a party cited can submit

sufficient proof that it is not responsible for compliance, the violation will not be considered as a violation by that party. It is unreasonable to expect the inspector to ascertain the identity of the responsible party with the degree of certainty necessary to name only those responsible at the time of issuance of the NOV. Therefore, if a party who could be designated as an operator is cited, such citation is proper. 1/

Three undisputed facts are important to our determination regarding the question of Jewell's responsibility for the operations at Mine No. 4, Splashdam. These undisputed facts are: (1) The coal being mined was owned by Jewell; (2) the coal was being mined by S & M pursuant to an oral lease; and (3) there was no currently valid permit with respect to the operation at the time of the inspection. 2/

Jewell contends that it was not the permittee or operator of the mine. In doing so, it relies in part on the fact that the coal was being extracted by S & M. The NOV cited both Jewell and S & M for failure to post necessary signs disclosing the name of the permittee. Therefore, there is no question that neither S & M nor Jewell openly declared that it alone was to be considered to be the permittee.

1/ The issuance of a permit raises the presumption that the party obtaining the permit is conducting the coal mining operation and thus is the party responsible for compliance with the standards. See Wilson Farms Coal Co., 2 IBSMA 118, 87 I.D. 245 (1980). In this case there was no permit, and the parties can be found to be jointly and severally liable for compliance with any applicable performance standards unless and until it can be demonstrated that one party is solely responsible for such compliance.
2/ For the purpose of our analysis of Jewell's involvement in the mining operation we disregard, temporarily, the ultimate question of whether the operation is subject to OSM's regulatory authority.

The OSM exhibits submitted at the time of the hearing included copies of an application for a permit and a permit to operate Mine No. 4, Splashdam. The named permittee was Jewell. While the record also discloses that the permit was released because of the limited area of land disturbed, there is no evidence that the permit was not issued to the proper party. No subsequent application was filed with the Commonwealth of Virginia by any other party. S & M was on the property and removing coal. The evidence is sufficient to warrant naming both Jewell and S & M in the NOV. As named parties they can be considered jointly and severally liable for compliance with applicable performance standards, unless evidence is tendered demonstrating that one of the parties is solely responsible for such compliance.

Appellants presented testimony that the operation was conducted by S & M pursuant to an oral lease. Further testimony was given that S & M sold coal to the buyer offering the best price, and that coal had been sold by S & M to parties other than Jewell. On the other hand, there is evidence that Jewell's employees took an active part in the planning and engineering functions in support of the mining operations by furnishing engineering and surveying support to S & M. Employees of Jewell testified that the company did not exercise any control over S & M other than requiring an accounting of the coal removed for the purpose of verifying royalty payments.

It is our opinion that, while the amount of control actually exercised is indicative of the relationship between the owner of the coal and the company or individual extracting the coal, the determination regarding exercise of control should not solely be based on past exercise of control. It is more important to determine the extent that a party can exercise control.

Control can be passive as well as active. If a party can commence exercising control over an operation without notice or a negotiated change in the contractual relationship between the parties, the ability to exercise control is tantamount to the actual exercise. Under these circumstances, the operator is fully aware that, if the owner desires to change the mining or sales practices, the operator must comply. When this happens, control is exercised simply by reason of the fact that the operator will conduct his operations in anticipation of the desires of the owner. Therefore, it is our opinion that, when a coal mining operation is conducted pursuant to an oral lease, the parties have chosen to exercise joint control over the operation. The lessee who is actually removing the coal from the ground exercises control over the operations on a day-to-day basis. The lessor maintains the right to exercise control over the operations by virtue of the ability to terminate the lease without cause if the lessor, for any reason, no longer desires to have the lessee do the actual mining of the coal. For example, appellants have referred to the sale of coal to third parties as evidence of S & M's independent status. However, if Jewell determined it to be in Jewell's best interest that it receive all of the coal, it could force S & M to deliver coal to the Jewell tipple by giving notice that, if S & M did not, the lease would be terminated.

[4] Since either party could be considered to be capable of the exercise of control over the operations, both parties are to be considered "permittees" under the Surface Mining Act, assuming that the mine operation is subject to regulation. Therefore, it is proper to determine that they are jointly and severally liable for compliance with any applicable performance standards.

Jurisdiction of the Office of Surface Mining

The burden of establishing a prima facie case regarding jurisdiction has been discussed previously. Appellants contend that the facts as presented do not support a determination that OSM has jurisdiction. There is no question that appellants sought to have the NOV dismissed because the operation had disturbed less than 2 acres of surface land, and thus properly raised this issue below.

The inspector stated that it was his belief that the total acreage disturbed was about 1.1 acres (Tr. 20). The permit application submitted states that the total acreage disturbed was 1.9 acres (OSM Exh. 2; Tr. 8). The inspector stated that during a conversation with an employee of Jewell he was told that the disturbed area was surveyed and found to be 1.1 acres (Tr. 8). The only documentary evidence introduced showing the ownership, use, maintenance, length, or acreage of the haul road leading to the minesite was the Jewell permit, which was introduced by OSM. The permit shows the road to contain 0.36 acre. The witness for S & M testified that he did not know who owned the road and that he had hauled and placed gravel on the road for the county (Tr. 42-48). Testimony indicates that the surface of the property in question was owned by a party other than S & M or Jewell (Tr. 55). Appellants raised the issue of the acreage exemption and based their case on documentary evidence presented by OSM and the testimony of its inspector that no more than 1.9 acres had been disturbed.

OSM's rebuttal case was based on the integration of operations owned or controlled by Jewell. However, the evidence with respect to operations in

the immediate vicinity of Mine No. 4, Splashdam, indicates that these mines are not integrated with Mine No. 4, Splashdam (Tr. 17-19). Nor was any evidence presented that would give this Board any idea of the distance from the Mine No. 4, Splashdam, operation to the nearest operation over which Jewell has or can exercise control, or of the affected area above the underground mine workings.

[5] If the issue of exemption from the Surface Mining Act is raised by a permittee or operator and the evidence presented shows that the operation has disturbed less than 2 acres, OSM can rebut this showing by demonstrating, inter alia, that the operation is one of a number of integrated operations collectively disturbing more than 2 acres. Cf. Harry Smith Construction Co. v. OSM, supra at 30. The evidence must demonstrate that there is some physical relationship between the operations or that the management and actual mining operation is so interrelated that it can be logically concluded that the person has treated the operation as one. 30 CFR 700.11(b). 3/

3/ The language of 30 CFR 700.11(b) (1982) at the time that the NOV was issued stated:

"(b) The extraction of coal for commercial purposes where the surface coal mining and reclamation operation affects two acres or less, but not any such operation conducted by a person who affects or intends to affect more than two acres at physically related sites, or any such operation conducted by a person who affects or intends to affect more than two acres at physically unrelated sites within one year * * *."

However, the provision "any such operation conducted by a person who affects or intends to affect more than two acres at physically unrelated sites within one year," had been suspended. 44 FR 67942 (Nov. 27, 1979). The suspended language was revised when 30 CFR 700.11(b) was amended in 1982. See 30 CFR 700.11(b)(2), 47 FR 33432 (Aug. 2, 1982).

In promulgating regulations pertaining to the application of the exemption for disturbance of less than 2 acres, OSM has been concerned that the limited exemption provided by Congress not be abused by operators seeking to evade the permitting and environmental performance standards of the Surface Mining Act. OSM's primary concern is directed to situations where an operator tries to claim the exemption by dividing what is essentially one mine into numerous sites of 2 acres or less, 47 FR 33426 (Aug. 2, 1982), or where a group of small operators is hired by one person to mine a particular site with each such small operator mining less than 2 acres, 47 FR 50 (Jan. 4, 1982).

In this case, OSM has presented no evidence which would cause this Board to conclude that the S & M operation was physically related to any of Jewell's other operations. The preponderance of the evidence is on the side of a determination that the operation was segregated from other Jewell operations by distance and by separation of operating functions. We conclude that the operation was, in fact, a separate mine.

Based upon the evidence presented, we find that at the time of issuance of the citation, Mine No. 4, Splashdam, was exempt from the application of the Surface Mining Act by reason of the fact that the operation had disturbed less than 2 acres of the surface land.

Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1 (as revised at 49 FR 7564 (Mar. 1, 1984)), the decision of Administrative Law Judge Allen is reversed and Notice of Violation No. 81-I-73-15 is vacated.

R. W. Mullen
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

James L. Burski
Administrative Judge